Mike Yurosek & Son, Inc. ***and*** **Santos Diaz.** Case 31–CA–18500

March 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

The principal issue in this case is whether the involved employees engaged in protected concerted activity.

On July 10, 1991, Administrative Law Judge James S. Jenson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answer in opposition and a brief in support of its answer.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

A hearing was held in this matter on April 11, 1991. At the end of the General Counsel's case-in-chief, the Respondent moved that the complaint be dismissed for failure to establish a prima facie case. The judge granted this motion, and on July 10, 1991, issued a decision in support of his ruling, finding that the activity engaged in by the employees was neither concerted nor protected. We disagree with his decision to grant the Respondent's motion to dismiss the complaint.

The Respondent is engaged in the business of processing, packing, and distributing fresh vegetables. In early September 1990,[1] Juan Garza, the cooling and warehouse manager, told the group of five employees on the day shift that he was going to reduce their hours to approximately 36 hours a week. The employees protested that this would not give them enough time to finish the work, but Garza replied that they were going to have to work that schedule whether they liked it or not. He also told them that they were to punch out at exactly the time he told them to punch out.

On September 24, the day shift was scheduled to work from 10 a.m. to 4:30 p.m.[2] The crew was comprised of Rafael Naraes, Antonio Lopez, Jose Rivera, Santos Diaz, and Jesus Cougas.[3] Naraes, a 9-year employee, was approached by Dock Foreman Jamie Ortiz, an assistant to Warehouse Manager Garza, around 4:25 p.m. that day and told to work another hour. Naraes replied that Garza had fixed a schedule and that it had to be done that way. He then went to the timeclock, where Diaz, Rivera, and Lopez were, and punched out. Naraes testified that, after punching out, Ortiz came and yelled at the employees, saying not to punch in the next day but rather to wait at the dining tables.

Lopez, an employee with 11 years' service, was told by Ortiz (either before or after he punched out) that he should work another hour. Although Lopez' testimony is not clear, it appears that Lopez responded that he had to respect what he was told before by Garza. After Lopez punched out, Ortiz said ''tomorrow when you come in, don't punch in.''

Rivera, an 11-year employee, testified that he was putting ice on a truck a few minutes before 4:30 p.m. and was unable to hear what Ortiz said. He asked Lopez what Ortiz said, and Lopez told him that Ortiz wanted them to stay for another hour. Rivera asked why, and Lopez said he did not know. After Rivera punched out, he overheard Ortiz say, ''if you punch out, you wait for me in the dining room.''

Diaz, an employee with 15 years' service, was approached by Ortiz around 4:25 p.m. and told to work an extra hour. Diaz said no, ''because Juan Garza told us that we had to leave at [a] . . . certain hour.'' Ortiz made no response and Diaz punched out at 4:30 p.m. Diaz testified that Ortiz appeared while the four employees were punching out and Diaz heard him say to Lopez ''[I]f you punch out, I [will] wait for you tomorrow [at] the . . . dining table.''

All four employees testified that there was no discussion among them about what response to make to the overtime request between the time that Ortiz told them to work another hour and the time that they punched out.

The next day, September 25, the four employees reported to work, and were told not to punch in. They then were called, as a group, to the office and met with Garza, Ortiz, and three other management representatives. The employees were asked why they did not work the extra hour. Naraes stated that he told the Respondent that he was obeying the schedule that Garza had posted. Rivera testified that, ''we told them, '[b]ecause we had to respect that schedule that Juan Garza posted.''' Lopez stated that he told the Respondent that ''we didn't stay there because Juan Garza had posted a schedule and he didn't want one minute more or one minute less from that.'' Diaz testified that his answer was that ''we had to respect'' the schedule posted by Garza. The employees were then discharged for failing to work the extra hour.

The judge found no evidence that there was any concerted plan of action among the employees or that any one of them relied on any other when each of them punched out and left work. He further found that the decision to leave work, rather than work overtime,

[1] All dates are in 1990 unless otherwise noted.

[2] This was consistent with the new schedule announced by Garza.

[3] Cougas left early in the day and was not involved in the incidents at issue.

was made by each employee on an individual basis and could not be deemed concerted. The judge also determined that the employees did not register any complaint with the Respondent over the requirement that they work overtime, and that the employees' actions amounted to an attempt to determine for themselves what hours they would work. The judge concluded that this conduct was in defiance of their supervisor, and as such, was insubordination, not protected activity.

The General Counsel argues that although there was no discussion among the four employees about the directive to work an hour longer than indicated on the schedule or about what response they should make to the directive, the four individuals gave identical responses and took identical action in response to the directive. The General Counsel argues that the conduct was concerted even though there was no concerted discussion.

The General Counsel also contends that the Respondent believed that the activity was concerted. In this regard, the General Counsel asserts that the Respondent at all times treated these employees as a single group. The General Counsel notes that when the schedule was changed in early September, the employees were told as a group and they apparently protested as a group. When the directive to work an extra hour was given on September 24, the employees gave identical responses and engaged in identical action. The Respondent then told them as a group not to punch in the next morning. Finally, the General Counsel notes, on September 25, the Respondent met with the employees as a group, received either a group response or identical responses as to why the employees did not work the extra hour, and then fired the employees as a group.

Further, the General Counsel contends that the conduct in which the employees engaged was protected under the Act, arguing that the employees' refusal to remain for another hour was not insubordination but rather a protest concerning hours of work, and thus protected strike activity.

The Respondent argues that the judge's decision is correct, and that the definition of concerted activity has not been met in the present case because there is no evidence that any employee was acting with, or on the authority of, any other employee.

We find that the General Counsel has made a prima facie showing that the employees engaged in concerted activity, or at least, that the Respondent believed that the employees' activity was concerted.[4] Further, we find that the General Counsel has established a prima facie case that the conduct that the employees engaged in was protected under the Act. Accordingly, we find that the judge erred in granting the Respondent's motion to dismiss at the close of the General Counsel's case-in-chief. In support of these findings, we rely on the following factors.

The employees on the day shift were gathered together as a group in early September and told by Garza as a group of the new scheduling policy. According to the testimony of employee Diaz, ''*[w]e* told him that was not going to be enough time to finish the work.'' (Emphasis supplied.) Thus, it appears that a group protest to the change was made, and that this concerted protest was directly communicated to the Respondent.

Although there is some variance in the employees' recollection of what happened on September 24, their testimony establishes that, a few minutes before the scheduled quitting time of 4:30 p.m., Ortiz approached three of the four individually and told them to work another hour. Ortiz then approached the four as a group, either while they were punching out or immediately thereafter, and told them not to punch in the following morning, but rather to wait for him at the dining tables.

On September 25, the employees were again gathered as a group. They were jointly asked why they had refused to work overtime. They replied that they were following the orders given them by Garza. After this response was given, the group of employees was fired.

By these facts, the General Counsel has demonstrated a prima facie case that, not only was the protest concerning working hours concerted, but the employees concertedly attributed their refusal to work overtime to the new schedule. Thus, although they did not not act as a group in refusing to work overtime in response to Ortiz' request,[5] all four reacted in an identical fashion: they refused to work; and Naraes, Diaz, and possibly Lopez attributed their refusal to Garza's clear instructions in early September. This is the same reason that all the employees voiced the following morning, prior to their discharge, when they were once again called together by the Respondent and asked why they had acted as they did. Indeed, Rivera testified that, ''*we* told them, '[b]ecause we had to respect that schedule that Juan Garza posted.''' (Emphasis supplied.)

We will find that individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are logical outgrowth of the concerns expressed by the group. See *Salisbury Hotel*, 283 NLRB 685, 687 (1987); *Every Woman's Place*, 282 NLRB 413 (1986), enfd. mem. 833 F.2d 1012 (6th Cir. 1987). Here, the employees' individual

[4] See *Daniel Construction Co.*, 277 NLRB 795 fn. 4 (1985).

[5] Their failure to discuss their response among themselves and to speak as one is explained by the fact that without warning, Ortiz' approached each employee individually. Given that fact, we find that no break occurred in the link between their original concerted protest over the reduced work hours and their individually asserted reasons for refusing to work the overtime.

responses to Ortiz' request that they work overtime on September 24, logically relate to their concerted protest over Garza's reduction in their schedule only a few weeks earlier. Moreover, the Respondent's actions in treating the employees as a group when they punched out on September 24 and again the next day, support the inference that the Respondent believed the employees were engaged in concerted activity. See *Daniel Construction Co*., supra. Thus we conclude that the judge erred in finding that the General Counsel failed to establish a prima facie case that the employees' actions were concerted.

In addition, we disagree with the judge's finding that the activity engaged in by the employees, even if concerted, was not protected. Concededly, it is not crystal clear, at this stage of the litigation, whether the employees were protesting (1) the Garza reduction in hours, (2) the Ortiz direction that they work an extra hour, or (3) a combination of the two, i.e., they felt that they were being subjected to inconsistent requirements. In any event, it is clear that a protest about any or all of the foregoing would be a protest about hours of work.

Employees have a right to engage in a concerted refusal to work, even when the assignment is to work overtime. Only when employees repeatedly refuse to perform mandatory overtime does their conduct become unprotected by the Act because that conduct constitutes a recurring or intermittent strike, which amounts to employees unilaterally determining conditions of work.[6] In the instant case, the employees refused to work overtime on only one occasion. There was no indication that they were planning to intermittently refuse to work overtime thereafter. In these circumstances, the employees' concerted refusal to work overtime on September 24 was protected by the Act.[7]

Accordingly, we reverse the judge's ruling granting the Respondent's motion to dismiss, and remand the case to the judge to reopen the record for further appropriate action and to issue a decision consistent with the findings in this Decision and Order.[8]

ORDER

It is ordered that this case is remanded to the administrative law judge to reopen the record for further appropriate action and, at the close of the record, to issue a decision consistent with this Decision and Order.

[6] *Sawyer of Napa, Inc*., 300 NLRB 131 (1990).

[7] Id.

[8] Member Raudabaugh joins his colleagues in their reversal of the judge's decision to grant the Respondent's motion to dismiss. However, he bases his denial solely on the fact that the General Counsel has established a prima facie case that the Respondent believed that the employees' response to the directive to work overtime was concerted. Member Raudabaugh also agrees that a concerted refusal to work overtime in the circumstances of this case would be protected. propriate action and, at the close of the record, to issue a decision consistent with this Decision and Order.

Bernard Hopkins, for the General Counsel.
Ronald H. Barsamian and *Richard B. Galtman (Finkle, Davenport & Barsamian)*, of Fresno, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. I heard this case in Bakersfield, California, on April 11, 1991. The complaint, which issued on December 12, 1990, alleges Respondent discharged four employees on September 25, 1990, because they engaged in protected concerted activities on September 24, thereby violating Section 8(a)(1) of the Act.

On April 11, 1991, I granted the Respondent's motion to dismiss the complaint on the ground the General Counsel had failed to prove a prima facie case, i.e., that the alleged discriminatee's conduct was neither concerted nor protected. On April 19, 1991, the General Counsel filed a motion to set due dates on motion to dismiss complaint. On April 23, 1991, during a conference call in which I informed the parties that I was disposed to grant the General Counsel's motion, it was agreed between the parties that the General Counsel would file a brief on or before May 15, 1991, and that Respondent would file a reply brief on or before May 27, 1991. My Order setting time for filing briefs in accordance with the parties' agreement issued on the date of the conference call agreement. Timely briefs by each of the parties were received, have been carefully considered and found to be both informative and helpful.

Upon the entire record in the case, including the oral arguments and posthearing briefs, I reaffirm my earlier ruling.

This decision will set forth the basis of that ruling and permit the General Counsel to file exceptions with the Board in Washington, D.C.

FINDINGS AND CONCLUSIONS

Juan Garza and Jamie Ortiz are the Respondent's warehouse manager and dock foreman, respectively, and admitted supervisors. Santos Diaz, Antonio Lopez, Rafael Naraes, and Jose Rivera are the alleged discriminatees, all of whom testified. At the time they were terminated, Diaz was a forklift operator, and the other three were loaders. It appears from the record testimony that sometime in early September, the four employees were informed by Garza that their hours were being reduced and that a work schedule would be posted so that they would know when to start and leave work. Naraes testified he complained about the reduction in hours.

On September 24, all four men were scheduled to leave at 4:30 p.m. Shortly before 4:30 p.m., Ortiz approached Diaz, Naraes, and Lopez separately and told each to work an extra hour. Diaz declined and left because he was scheduled to work only until 4:30 p.m. Naraes testified he told Ortiz that Garza had fixed the schedule and that was the schedule he had to follow. Rivera testified that Ortiz didn't tell him not to leave at 4:30 p.m., but that Lopez told him Ortiz had told Lopez that the men were going to work another hour. Instead, he picked up his sweater and punched out. Lopez testified that when he was ready to punch out, Ortiz told him to work an hour more. He punched out and left instead. Ri-

vera testified that the men didn't discuss leaving among themselves, and Lopez and Naraes confirmed the fact that no one said anything in response when Ortiz told them, after they had punched out and were leaving, that they should not punch in the following morning and that Ortiz would meet them in the lunchroom.

When the men reported the following day, they were asked why they hadn't worked the extra hour the day before, to which a response was made that Garza had fixed the work schedule and that was the schedule they had to follow. They were then discharged for failing to work the extra hour.

Discussion

Section 8(a)(1) of the Act defines as unfair labor practices acts of employers which interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Section 7 gives employees certain organizational and bargaining rights and the right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . . ''The General Counsel argues that when employees take identical action, although taken independently of each other, they are engaging in a concerted activity. He argues that their simultaneous leaving the Respondent's premises without working the extra hour constitutes a protest. The Respondent argues that the General Counsel ''failed to establish any communication, or mutual understanding or expression [among the employees] and, therefore . . . failed to meet its burden by establishing facts amounting to concerted activity.'' It further argues that even in instances where employees have discussed among themselves their desire to protest certain employment practices, the employees must clearly communicate their shared demands to the employer, which they failed to do here.

There is a common thread in the cases relied on by the General Counsel. In each, there was a group decision to protest, and the motive for leaving was conveyed to the employer. In *E. B. Malone Corp.*, 273 NLRB 78 (1984), the employees discussed the change in policy regarding their use of the telephone and agreed to leave the job at the regular time in protest rather than work an hour overtime. The reason for their leaving was conveyed to the employer. In *Smithfield Packing Co.*, 258 NLRB 261 (1981), employees walked out to protest the employer's commitment to limit their working hours for that day. They discussed leaving among themselves and informed a supervisor of their motives for leaving. In *Daniel Construction Co.*, 277 NLRB 795 (1985), four employees ''engaged in a work stoppage in protest over being denied permission to leave the jobsite during a driving, freezing rain which caused them to become wet and cold.'' They had ''discussed their mutual concerns about their discomfort and safety, made simultaneous requests for early-out passes, left the worksite together when their requests were denied, rode the same trucks to the parking area, agreed to meet at the personnel office, and jointly discussed their concerns about the adverse working conditions with individuals in the personnel and payroll offices.'' In *J. P. Hamer Lumber Co.*, 241 NLRB 613 (1979), the undisputed testimony established that the employees ''discussed among themselves the common problem posed by their many hours of overtime and what their response should be'' to the shared problem, all of which was conveyed to the employer. In *Nu Dawn Homes*, 289 NLRB 554 (1988), the employees were found to have been engaged in ''concerted'' activities in circumstances where they ''shared their concerns about the Respondent's overtime practices with one another as well as bringing it to management's attention on more than one occasion.'' *In Interlink Cable Systems*, 285 NLRB 304 (1987), three production workers and two supervisors were docked 15 minutes for returning late from lunch and, confronted as a group, issued warning notices which they were requested to sign before returning to work. The entire group protested signing and were told they had to sign before resuming work, which they refused to do. Consistent with the facts in the other cases relied on by the General Counsel, the facts in *Interlink* reveal a group protest which was made known to the employer. While it was found that the members of the group had indeed acted in concert when they refused to sign the warning slips, it was further found that the concerted action was not protected since the group had attempted to dictate for themselves which of management's ''orders or terms of conditions of employment it would observe.'' In so finding, Administrative Law Judge Irwin Kaplan, whose findings and conclusions were adopted by the Board, discussed *Bird Engineering*, 270 NLRB 1415 (1984). In that case ''employees concertedly ignored, as unfair, a newly established company rule, effective immediately, prohibiting them from leaving respondent's facility during their work shifts. Prior to this time, employees had followed a practice of punching in and out from lunch when leaving and returning to the facility. One of these employees complained to the respondent that the rule was unfair and noted that he did not have his lunch inside the plant (presumably because the new rule was announced that day). The employees ignored respondent's warnings, clocked out in protest, and were discharged. In finding that the employees acted concertedly but were unprotected in the manner they elected to defy the new rule, the Board reasoned, in pertinent part, as follows:

> These employees did not engage in a strike, withholding of work, or other permissible form of protest to demonstrate their disagreement with the Respondent's rule. Instead they simply chose to ignore the rule in direct defiance of the direction and warnings of management. *By treating the rule as a nullity and following their pre-rule lunchtime practice they did not participate in a legitimate protected exercise but rather engaged in insubordination.* These employees were attempting both to remain on the job and to determine for themselves which terms and conditions of employment they would observe. [Emphasis added.]

It is clear from the evidence presented by the General Counsel in the instant case that Supervisor Ortiz ''approached three of the alleged discriminatees'' separately and told each that he was to work an extra hour. The fourth employee was told by one of the other three that Ortiz had said the men were going to work another hour. In defiance of the order, and without discussing the matter between themselves, the men punched out and left. It is clear from their testimony that they did not discuss among themselves either working overtime or leaving or engaging in any type of concerted activity. It is further clear that there was no group spokesman and that the group did not register a protest, unless, as the

General Counsel argues, their punching out and leaving at the same time can be considered as one.

In order to prove a ''concerted activity,'' it is necessary to demonstrate that the activity was for the purpose of inducing or preparing for group action to correct a grievance or complaint. *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964). In *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub. nom. *Prill v. NLRB*, 835 F.2d 1421 (D.C. Cir. 1987), the Board reconsidered its decision in *Meyers I*,[1] on remand from the U.S. Court of Appeals for the District of Columbia Circuit, and stated that it intended *Meyers I* to be read as fully embracing the view of concertedness exemplified by the *Mushroom Transportation* line of cases and reiterated that its definition of concerted activity in *Meyers I*, encompassed those circumstances in which individual employees seek to initiate or induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. The Board went on to state in *Meyers I*, that ''individual employee concern, even if openly manifested by employees on an individual basis, is not sufficient evidence to prove concert of action.'' There is no evidence in the instant case that there was any concerted plan of action between the employees or that any of them relied on any other when each punched out and left work. Nor is there any evidence to indicate that the refusal of one to work overtime was intended to enlist the support of the other employees. Their decisions to leave rather than work overtime were made by each employee on an individual basis and cannot be deemed concerted. Further, no complaint was registered with the Respondent over the requirement they work overtime, but rather, as in *Interlink Cable Systems* and *Bird Engineering*, the employees attempted to determine for themselves what hours they would work in defiance of their supervisor. Such conduct amounts to insubordination and is not protected by the Act.

Accordingly, for failure to prove a prima facie case, I granted Respondent's motion to dismiss the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint in Case 31–CA–18500 is dismissed in its entirety.

[1] 268 NLRB 493 (1984).

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.